Supreme Court of California.

BAXTER *v.* ROBERTS.

B., who was a carpenter, was employed by R. to go in a boat, upon a submerged lot owned by him; and do certain work of his trade. While there at work, a shot was fired from a house on an adjacent lot, which wounded B., hence his action for damages. It appeared that R. knew his possession of the lot was resisted and a resort to arms was imminent at any moment. He did not inform B. of this fact, and the latter had no reason to believe he was going into danger when employed to do the work.

Held: R. was liable. The risk B. legally agreed to take was such as was necessarily incident to his employment.

R. could have relieved himself of responsibility by informing B. of the facts of the danger.

The concealment of facts, or the failure to state them by employer to employee, which would tend to expose any hidden and unusual danger to be encountered in the course of the employment, to a degree beyond that which the employment fairly imports, renders the employer liable for injuries resulting therefrom to the employee.

THIS was an action brought by Baxter, a carpenter by occupation, to recover damages for certain injuries sustained by reason of a gunshot wound received by him at the hands of some unknown party. Roberts was the owner of a certain lot in San Francisco, covered by water, and lying upon the southerly side of Seventh street, and which had been enclosed by him with a fence, and he employed the plaintiff to go with him upon these premises and perform labor there as a carpenter. Upon reaching the lot in a boat, the plaintiff and another employee in company with the defendant commenced to tear away some boards from a fence newly erected thereon, and which ran across the northerly corner of the lot to Seventh street, when the party were fired upon from a house or shanty situate upon a neighboring lot to the west of Roberts's lot, and the plaintiff was shot through the joint of the left shoulder with a rifle-ball, which carried away portions of the bone, causing him great physical suffering, and, in the opinion of his medical attendant, maiming him for life.

The opinion of the court was delivered by

WALLACE, C. J.—The evidence upon the part of the plaintiff tended to show, and the verdict of the jury upon the issues joined, must be considered to have found the fact to be, that when the defendant engaged the services of the plaintiff to work upon these premises and took him there in the boat for the purpose of per-

forming the labor, the defendant knew or had information such as would reasonably lead him to believe that his interference with the newly erected fence would be forcibly resisted by certain other parties who had erected it and claimed to be in its possession, and who actually occupied the shanty already referred to with loaded firearms, within shooting range of this fence, and who had announced to the defendant their purpose to resist by force any interference therewith. The verdict must be considered, too, to have found that such knowledge, belief or information as the defendant possessed upon these matters was not communicated to, but was withheld by him from the plaintiff, who went to the performance of the work in ignorance and without the apprehension or suspicion that in going, he was incurring any personal danger or hazard.

The learned judge of the court below stated to the jury that "the turning-point in this case is the charge that the defendant, Roberts, employed the plaintiff, Baxter, to perform a service which he, Roberts, knew to be perilous, without giving Baxter any notice of its perilous character;" and instructed them as follows:—

"If Roberts knew or if he had good reason to believe that rigid or forcible resistance would be offered to him and his party by parties whom he knew or believed to be there, on the ground or in the vicinity near by, it was his duty to inform Baxter of the nature of the employment, to disclose that knowledge so that Baxter might act understandingly and take the chances if he chose to do so. If Roberts had such knowledge and concealed it from the plaintiff, then he is liable.

"If you find the persons shooting had any adverse possession or occupation, whether complete or otherwise, at the time of the shooting, and the defendant knew the fact, and if you further find that the defendant had knowledge that such possession would be maintained by force if interfered with by him by the taking of the 'new fence' so called, and concealed such knowledge from the plaintiff, and failed to inform him of the danger of the employment, he must be held liable in damages, and you should find a verdict for the plaintiff."

That one contracting to perform labor or render service thereby takes upon himself such risks and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer have knowledge or information

showing that the particular employment is from extraneous causes known to him to be hazardous or dangerous to a degree beyond that which it fairly imports, or is understood by the employee to be, he is bound to inform the latter of the fact or put him in possession of such information; these general principles of law are elementary and firmly established. They are usually applied to cases in which the employee has sustained injury by reason of some defect or unsoundness in the machinery or materials unknown to him, about which he is employed to perform labor, and of which the employer knew, or might have known, in the exercise of ordinary care and vigilance on his part. The general principle which forbids the employer to expose the employee to unusual risks in the course of his employment, and to conceal from him the fact of such danger, is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third persons acting in hostility to the interests of the employer and through agencies beyond his control. The employee is as clearly entitled to information of such known danger of that character as of any other the existence of which is known to the employer. The employer, if he knew or was informed of a threatened danger of that character, was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule, for the employee is entitled in all cases to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if, at the proffered compensation, he be willing to assume the risk and incur the hazard of the business; and if the employer has such information or knowledge and withholds it from the employee, and the latter afterwards be injured in consequence thereof, the employer is liable to him in damages therefor.

Judgment affirmed.

I. *For one to lead another to expose himself to a danger or loss known to the former and unknown to the latter, whereby the latter is injured, is a tort for which action will lie.*

Dig. p. 43, § 2 (De Dolo Malo).—Dolus malus non tantum in ea est qui fallendi causâ obscure loquitur sed etiam qui insidiose vel obscure dissimulat.

Cicero De Officiis, B. 3, ch. 12 & 13.—"To be silent is one thing, concealment is another. You may be silent respecting facts within your knowledge, without being guilty of concealment. You

are guilty of it when the motive of your silence is a wish that others for your advantage should be ignorant of facts which you know, and which it is for their interest that they should know." Obviously too broad a statement and one to which the author is by no means faithful.

Com. Dig. "*Action on the case for deceipt*," A. 1. "An action upon the case for a deceipt lies when a man does any deceipt to the damage of another."

In *Chapman* v. *Pickersgill*, 2 Wils. 145, where case was held to lie for maliciously suing out a writ of bankruptcy, WILMOT, C. J., said: "It is said this action was never brought, and so it was said in *Ashby* v. *White*. I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief."

As to cases where recovery is rested on defendant's duty apart from contract, *vide Marshall* v. *R. W.*, 11 C. B. 655, opinions of JERVIS, C. J., and WILLIAMS, J.; *Burrows* v. *Gas Co.*, *infra* p. 48; *vide* also 7 Am. L. R. 660–1.

In *Baily* v. *Merrell*, 3 Bulstrode 95, it is said: "Fraud without damage and damage without fraud gives no cause of action, but where these two do both concur and meet together there an action lieth," &c.

Cushing's Strahan's Domat, Part I. Book I. Tit. VIII., Sec. IV. Art. IX., p. 620. "When any loss or damage happens from an accident, and when the act of some person which is mixed with the accident has been either the cause or occasion of the said event, it is by the nature of the act and by the connection which it may have with what has happened that we ought to judge whether the said person should be made to answer for the damage, or should be acquitted of it."

Vide Keegan v. *R. R.*, 4 Selden 178–9, for cases under the general point I.

See *Barry* v. *Croskey*, 2 Johns. & Henning 1, for a statement by V. C. (since Lord HATHERLEY) of general principles as to what constitutes misrepresentation and the liability for it. For authorities on general point above see *Smith* v. *Dobson*, 3 M. & G. 82.

Contributory negligence is an obvious exception to above principle, and in our jurisprudence bars all recovery on plaintiff's part: *vide* for some qualifications to this last, *Bridge* v. *Grand Junction R. R. Co.*, 3 M. & W. 248: and *Lynch* v. *Nurdin*, 1 Ad. & El. N. S. 29, per DENMAN, C. J., for cases where trespasser recovered for injury done him by defendant (the ground seems to be that the plaintiff's wrong as compared with defendant's was relatively naught, and that to it the term "contributory" could not rightly be applied): and where plaintiff ignorantly contributing to his own injury was also allowed to recover. See *Tuff* v. *Warman*, 2 C. B. N. S. (89 E. C. L.) p. 739, for dictum as to cases where a wrong-doer may recover. *Southcote* v. *Stanley*, 1 H. & N. 247. Plaintiff came as a mere visitor to defendant's hotel, and on leaving opened a door to go out from which a piece of glass fell and hurt him. Declaration alleged carelessness, negligence and default, &c., on defendant's part. BRAMWELL, B., rested his opinion on the ground of there being no commission, but merely omission alleged on defendant's part; that declaration did not show want of reasonable care, and that therefore plaintiff could not recover. A distinction was taken between a visitor invited to a house and one coming into a shop on business as against the former. *John* v. *Bacon*, L. R. 5 C. P. 437: Defendant was a carrier of passengers. Plaintiff, such passenger, fell down a hatchway in hulk which was carrying him to steamer; allowed to recover. BRETT, J., remarked: "I doubt whether any invitation which does not amount to a contract or to a

false and fraudulent misrepresentation can be the foundation of legal liability. If the contract of carriage in this case did not cover the hulk, I should doubt very much whether the defendant was liable." *Vide Indermaur* v. *Dames, infra.*

II. *A condition implied in every contract of employment is that employee shall not be exposed to any risk which he cannot generally foresee, as for example, such as are not ordinarily incident to the employment. If the employer knows or has it in his power to know of such risk, a concealment of it is a breach of contract, and if the injury ensue, actions both in tort and contract will lie.*

Keegan v. *Railroad*, 4 Selden 178–9; *Brydon* v. *Stewart*, 2 MacQueen 30. Negligence of fellow-servant is regarded as an ordinary risk, incident to the employment.

Davies v. *England*, 33 Law J. Q. B. 321. Employer gave employee diseased beef to cut up, whereby latter was injured. Action held to lie.

Paterson v. *Wallace*, 1 MacQueen 751. "When a master employs a servant in a work of a dangerous character he is bound to all reasonable precaution for the safety of that workman."

Noyes v. *Smith*, 28 Vt. 59. The master is bound to exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers.

O'Byrne v. *Burn*, 16 Sec. Ser. 1025 (Scotch Case). Plaintiff, who was an inexperienced employee, was injured in attending defendant's machinery. Held to recover. Everything was in proper order, and the danger was to a degree obvious; but plaintiff should never have been put at such work.

Fraser on Law of Scotland relative to Master and Servant, p. 93: "The master is bound to take all reasonable precautions which ordinary prudence would suggest, &c. The general rule appears to be that on the one hand the master is responsible in damages for all injuries arising from causes which he might have foreseen and obviated * * * * all risks which can be said to arise from his rashness, carelessness or neglect, and not properly to be incident to the contract. On the other hand, if the servant has just as good opportunity of making himself aware of the danger as the master," &c.

Cushing's Strahan's Domat, Part I. Book I. Tit. XV. Sec. II. Art. VI. (p. 471). "If a proxy or agent suffers any loss or damage on account of the affair which he has taken in hand, we must judge by the circumstances whether the loss ought to fall on the proxy or on the person whose affair he manages; which will depend on the quality of the order which was to be executed, the danger if any—the nature of the event which has occasioned the loss—the connection between the event and the order that was executed—the relation which the thing lost or the damage sustained had to the affair which was the occasion of it, &c., and on the circumstances which may charge the one or the other with the loss or discharge them of it. As to which we must cast into the balance the consideration of equity and the sentiments of humanity which one ought to have whose interest has been the cause or occasion of loss to another."

Indermaur v. *Dames*, 2 Law Rep. C. P. 313, KELLY, (C. B). "If a person occupying such premises (*i. e.* with shaft-holes in the different stories), enters into a contract in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safe-guard about the hole, or if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him. That view was taken in the judg-

ment in the court below, where it is said (by WILLES, J.), 'With respect to such a visitor at least we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that when there is evidence of neglect the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, &c., is matter of fact for the jury.' "

Britton v. *Great Western Cotton Company*, 41 L. J. Exch. 99. Defendants by statute were required to fence a certain wheel, which they failed to do. Plaintiff's intestate was killed by the wheel. Jury found that there was no contributory negligence on decedent's part. Court held that decedent by merely engaging upon the work, the danger of it not being obvious, was not "*volens*," and the plaintiff on the verdict could recover.

Priestly v. *Fowler*, 3 M. & W. 1. Master does not *guarantee* servant's safety *i. e.* is not responsible for unknown danger: is not bound to take more care of the servant than he may be expected to take of himself. See Lord ABINGER'S opinion. In this case plaintiff must have known danger as well as master.

Coomes v. *New Bedford Co.*, 102 Mass. 572. The extract from head-note given below contains all the law and facts of this case relevant to our purpose. For a full repertory of cases bearing on the point now under consideration, see argument for plaintiff's counsel, pages 577-80, and p. 595; see also opinion of HOAR and GRAY, JJ.

Extract from head-note: "The fact that very near where a workman is voluntarily employed in a manufactory, machinery not connected with his work is in motion the dangerous nature of which is visible and constant, is not conclusive that he has taken on himself the risk of being injured by it in modification of the implied contract of his employer to provide for him a reasonably safe place in which to do his work, and if through inattention to the danger he meets with such an injury while doing his work, and sues his employer therefor, the question whether he met with it with due care on his own part and by reason of the neglect of his employer to give him suitable notice of the danger, is for the jury."

Riley v. *Baxendale*, 6 H. & N. 443. Held that from ordinary contract of service, a stipulation that employer should not expose employee to extraordinary risk could not be inferred. There might be a duty, but duty did not raise a contract. Plaintiff had no business, if employment was dangerous, to undertake it; and in this case he must have known the danger quite as well as the master. *Williams* v. *Clough*, 3 H. & N. 258: Unsafe ladder of employer, defendant; recovery because danger unknown to plaintiff. *Wonder* v. *Baltimore, R. R. Co.*, 32 Md. 411: *Dictum:* Master must not expose servant to extraordinary risks. *Mellors* v. *Shaw*, 101 E. C. L. (1 B. & S.), p. 437, for authorities on master's liability towards servant for negligence. *Peck* v. *Neil*, 3 McL. 22: Action by stage passenger against negligent carrier; another stage not belonging to defendant contributed to the injury, recovery allowed; said the court, "Every omission of duty by the driver which in any degree increased the risk of the passengers, subjected the defendant to damages for an injury done them. That although the upsetting of the stage may have been caused immediately by the driver of the mail-stage" (the third party), "for which he and his employers were liable to damages, still, if Neil's (defendant's) driver under the circumstances did not use all the means which a skilful and prudent driver could and would have used to prevent the injury done, the defendant is liable."

III. *The contributory negligence of a*

third person without which the defendant's negligence would not have harmed the plaintiff, is no defence. There is no distinction between the wilful and negligent fault of such third person. It is immaterial whether the risk comes from the dangerous condition *of a* material object *into connection with which the employee is brought or from the dangerous* acts *of a* third person.

In *Lockhart* v. *Lichtenthaler*, 4 Am. Law Reg. N. S. 15 (46 Penn. 158), will be found a very full discussion of the point whether plaintiff, a passenger, injured by the concurring negligence of his carrier and a third person, has any action against third person. It will be seen that his action against carrier is never questioned, nor is it suggested that the fault of third person would avail carrier as a defence. The court held only that no action lay against third party; and while some of the authorities cited rested the ruling on identity of passenger with carrier, thought it a principle of public policy to incite carriers to diligence and prudence; it will be seen that the cases on this question are quite at war. Besides cases cited in opinion see *Peck* v. *Neil*, 3 McLean 23, and *Brown* v. *R. R.*, 32 N. Y. 602, and *Mooney* v. *R. R.*; 5 Robertson (N. Y.) 548.

Lynch v. *Nurdin*, 1 Ad. & E. (N. S.) 29, 41 E. C. L. 426. Defendant left cart standing, a child led horse over plaintiff, another child.—Action lay. DENMAN, C. J., says: "Between wilful mischief and gross negligence, the boundary line is hard to trace, I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice." This is applied to defendant, and certainly to a still less degree could the distinction be taken in regard to wrong of the contributing third person.

Smith v. *Dobson*, 1 M. & G. 60. Plaintiff's barge was sunk by a swell caused by the defendant's steamer, which plaintiff alleged was run too near barge and too rapidly. Defence that a larger steamer first caused the swell and defendant only increased it; with a further plea of mismanagement on part of plaintiff's servant. The Lord Chief Justice told the jury that the plaintiff was not entitled to recover if, in their judgment, the misconduct of the plaintiff's servants or the insufficient manning of the barge contributed to the loss, or if the injury was occasioned wholly by the Ramona (the larger steamer). Verdict for plaintiff, not disturbed on rule. ERSKINE, J., said: "I also am of opinion that there is no ground for entering a verdict for defendant, and that verdict found for plaintiff was right; the jury might well conclude from the evidence that the defendant had either caused or contributed to the accident. Though the swell occasioned by the Water-Lily" (defendant's steamer), "might not have sunk the barge if the water had not been previously agitated by the Ramona, still if the jury thought that the accident would not have occurred but for the improper conduct of the defendant's servants, the defendant was in strictness liable for the whole damage. *Mott* v. *Hudson R. R.*, 8 Bosw. 345, concurrent wrong of third person no defence to defendants: *Colegrove* v. *Harlem R. R.*, 6 Duer 382, and *N. Y. & N. H. R. R.*, 20 N. Y. 492, relied on. Defendant's train cut hose of firemen trying to put out fire, which injured plaintiff's property, held to be error to direct the jury that if firemen were negligent in not warning train, plaintiff could not recover.

Eaton v. *Boston & Lowell R. R.*, 11 Allen 505. Action of tort by passenger against carrier for injury to person. COLT, J.—"It is no answer to an action by a passenger against a carrier that the negligence or trespass of a third person contributed to the injury. These propositions would be more manifest if this action had been brought in form upon

the implied undertaking of the defendants, but the plaintiff may elect to sue in tort or contract, and the rule of duty is the same in either form of action: *Warren* v. *Fitchburg R. R.*, 8 Allen 227; *Ingall* v. *Bills*, 9 Met. 1; *McElroy* v. *Nashua & Lowell R. R.*, 4 Cush. 400; *Sullivan* v. *Philadelphia, &c., R. R.*, 30 Penn. State R. 234. Even if no privity of contract existed and the injury was the result of the joint acts of defendants and the owner of the load of hay and the Eastern R. R. Co., it would furnish no defence to this action: for in actions of this description non-joinder of the defendants cannot be availed of in bar. And this is true although the party contributing by his negligence was acting without concert with and entirely independent of the defendants: *Illidge* v. *Goodwin*, 5 C. & P. 190."

Burrows v. *The March Gas & Coke Co.*, L. R. 5 Exch. 67, (affirmed L. R. 7 Exch. 96). The defendants, a gas company, having contracted to supply the plaintiff with a service-pipe from their main to the meter on his premises, laid down a defective pipe from which the gas escaped. A workman in the employ of a gas-fitter engaged by the plaintiff to lay down the pipes leading from the meter over the premises, negligently took a lighted candle for the purpose of finding out whence the escape proceeded. An explosion then took place whereby damage was occasioned to the plaintiff's premises, to recover compensation for which the plaintiff brought his action against the defendants.

Held, 1. That the damage was not too remote:

2. That the plaintiff not being master of the workman could not be considered as contributing to the damage by reason of his act: and

3. Was therefore entitled to recover.

Says KELLY, C. B., after stating the case and arguing that the plaintiff was not responsible for the workman's negligence: "The defendants having been guilty of negligence by which the accident was caused, the plaintiff is entitled to maintain his action to recover compensation from the defendants for the damage occasioned to his property."

Says CHANNELL, B.: "It does not appear to me in the view I take, very important whether this action should be considered as founded in contract or upon a duty. Whether it was the case of a contract or of a duty, it seems to me the defendants have failed in the performance of it, and the consequence of such a failure was the damage complained of."

Says PIGOTT, B.: "It was argued for the defendants that the damage was too remote. Now the mere fact that there is another cause brought in without which the damage would not have occurred, does not in my view make the first and main cause a remote cause of the damage; it can only disentitle the plaintiff to recover in cases where the ground may be taken that he has contributed that without which the damage would not have occurred. It seems to me that the escape of the gas was plainly the proximate cause of the damage of which the plaintiff complains. If that be so, though there is another cause without which the explosion would not have happened, yet that does not disentitle the plaintiff from recovery, unless he can be affected by the negligent conduct of Sharratt" (the workman), "and so must be taken to have contributed to the damage. I do not think that the plaintiff is responsible, &c. As my Lord has put it, there were two independent contractors employed by the plaintiff to do work upon the premises. Both are guilty of negligence by which the plaintiff sustains considerable damage. Is the plaintiff disentitled to complain of the negligence of one because the other contributed to the damage? It seems to me he ought to be entitled to

complain of both and to be able to recover against both. The fact that he is entitled to recover against one cannot deprive him of his right to recover against the other."

Vandenburgh v. *Truax*, 4 Denio 465: Defendant having had a quarrel with a boy in the street in a city, took up a pick-axe and followed him into the plaintiff's store whither he fled, and in endeavoring to keep out of defendant's reach the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of wine ran out and was wasted: held that the defendant was liable to the plaintiff in damages.

See also *Ricker* v. *Freeman*, 11 Am. Law Reg. N. S. 692.

In *Guille* v. *Swan*, 19 Johnson 381, the immediate actors in the wrong which was done to the plaintiff were moved by their sympathy for the defendant, who had brought himself into a perilous condition by ascending in a balloon. The balloon descended into plaintiff's garden, which was near where it had gone up, and a crowd of people seeing the defendant hanging out of the car in great peril, rushed into the garden to relieve him, and in so doing trod down the plaintiff's vegetables and flowers. For the wrong done by the crowd as well as for the injury done by himself, the defendant was held answerable as a trespasser. Although the ascent was not illegal, it was a foolish act, and the defendant ought to have foreseen that injurious consequences might follow. The case seems not to have been put upon the ground of a concert of action between the defendant and the multitude, but on the ground that the defendant's descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him either from curiosity," &c.

Powell v. *Deveny*, 3 Cush. 300. Defendant negligently left his truck in the street; another truck stood opposite: a driver of a third truck tried to pass between the two, and was not negligent in so doing; he upset defendant's truck, whereby plaintiff was hurt. Action sustained citing *Lynch* v. *Nurdin*.

Danville Turnpike Co. v. *Stewart*, 2 Metc. (Ken.) p. 122: *Dictum:* "Where an injury is caused by negligence of two persons, the fault of one is no excuse for that of the other. Both in that case are liable to the party injured."

McCahill v. *Kipp*, 2 E. D. Smith 413. Defendant left his horse standing; a third person frightened it so that it ran away and injured plaintiff. Action lay.

Illidge v. *Goodwin*, 5 Carrington & P. 190. Defendant left his cart unguarded; a hird person struck the horse so that it backed into and broke plaintiff's window. Action lay.

Mooney v. *R. R.*, 5 Roberts (N. Y.) 553. "Even a party," says ROBERTSON, J., "guilty of negligence himself is, in reference to the degree of care he is bound to use, entitled to rely on the obligation of others to use ordinary care to avoid the consequences of his negligence when threatened by it with an injury, and is exempted from liability for the effect of a failure by others to discharge their duty in that respect." By the word "others" the learned judge appears to have referred not to third persons but to plaintiffs guilty of contributory negligence.

IV. *Where the attempt of the employer to have his work carried out is the contingency which determines the happening of the injury, the employment is* causa causans *and not merely* causâ sine quâ non *of the injury.*

Greenland v. *Chaplin*, 5 Exch. 247. Says POLLOCK, C. B.: "I am desirous to be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no reasonable person have been anticipated.

Whenever that case shall arise I shall certainly desire to hear it argued and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." *Vide Burrows* v. *Gas Co.*, *supra*, p. 48.

As to remoteness of damage, *vide* Broom Leg. Max. (5 Ed. 1870). 216, for excellent selection of authorities.

V. *A criminal prosecution against the third persons in the principal case guilty of the assault, not necessary before bringing civil suit against employer.*

See 1 Leading Criminal Cases 27, *White* v. *Font. Pettingill* v. *Rideout*, 6 N. H. 454, with authorities, decided that a civil action may at once be brought against a felonious tort-feasor, the policy of the contrary doctrine being inapplicable to this country: *Boardman* v. *Gore et al.*, 15 Mass. 331, to the same effect with authorities, action against partner of wrong-doer on partnership-note (rule of suspension said to be confined to robberies and larcenies.)

Query; whether defendant was criminally liable. 1 Leading Criminal Cases 42, 49, *cum notis*.

H. R.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ALABAMA.[1]
SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[2]
COURT OF CHANCERY OF NEW JERSEY.[3]
SUPREME COURT OF NEW YORK.[4]
SUPREME COURT OF VERMONT.[5]

ACTION.

For Injury to Real Estate does not survive to Administrator.—At common law, a remedy by action on the case for an injury to real estate did not survive in favor of an administrator. *Forist* v. *Androscoggin R. I. Co.*, 52 N. H.

To sustain an action on the case under the statute of New Hampshire, by an administrator for an injury to real estate after the death of his intestate, the facts on which his right to sue depends must be stated in the declaration: *Id.*

ADMINISTRATOR. See *Action*.

ADMIRALTY.

Jurisdiction over Maritime Contracts is exclusive in United States Courts.—The United States District Courts have jurisdiction, exclusive of the State Courts, to enforce maritime contracts according to the usage and practice of Courts of Admiralty: *Murphy* v. *Mobile Trade Company*, 49 or 50 Ala.

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[1] From Hon. Thos. G. Jones, Reporter; to appear in 49 or 50 Ala. Reports.
[2] From J. M. Shirley, Esq., Reporter; to appear in 52 N. H. Reports.
[3] From C. E. Green, Esq., to appear in Vol. 9 of his Reports.
[4] From Hon. O. L. Barbour, to appear in Vol. 65 of his Reports.
[5] From J. W. Rowell, Esq., Reporter; to appear in 45 Vt. Reports.